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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1400

ALBERT JOHN PENA, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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NO. _____

ALBERT JOHN PENA, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ALBERT JOHN PENA, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on March 3, 1976.

OPINION BELOW

The opinion of the Court of Appeals has not been reported and it is appended hereto in its slip opinion form as Appendix I.

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1976.

Jurisdiction to issue the writ is invoked, pursuant to the provisions of Title 28, Section 1254(1), United States Code.

Petitioner was convicted in the United States District Court for the Southern District of Texas on three counts of a three count indictment charging him with distribution of heroin, possession with intent to distribute heroin and conspiracy to distribute heroin. Title 21, Sections 841(a)(1) and 846, United States Code.

QUESTIONS PRESENTED

I.

Whether, under Rule 804(b)(3) of the New Federal Rules of Evidence, extrajudicial declarations of a government informant (proffered by the defense) must be "unequivocally incriminating" or merely "arguably inculpatory" to be admissible within the "statements against interest" exception to the Hearsay Rule.

II.

Whether and to what extent *Chambers v. Mississippi*, 410 U.S. 284 (1973) and traditional concepts of due process require admission of proffered defense testimony concerning the extrajudicial admissions of a government agent, where such testimony is "crucial" to the specific defense being presented by the accused.

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III.

Whether the Petitioner was denied Sixth Amendment rights by a nine-month delay between his first trial (ending in a hung jury) and commencement of his retrial, where a potential defense witness died during the hiatus, where the delay patently violated a local plan for prompt disposition of criminal cases and where the total lapse of time between indictment and retrial was three years.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth and Fourteenth Amendments of the Constitution of the United States.

Title 21, Sections 841(a)(1) and 846, United States Code.

Federal Rules of Evidence, Rule 804(b)(3) provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissable unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Plan for the United States District Court for the Southern District of Texas for Achieving Prompt Disposition of Criminal Cases:

> "7. *Retrials.* Where a new trial has been ordered by the District Court or a trial or a new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than ninety days after the order therefor becomes final unless extended under Section 3."

STATEMENT OF THE CASE

1. The Government's Case

The case involves an alleged narcotics transaction between an undercover agent (Joaquin Legarreta) and the Defendant (Albert John Pena) set up by a "special employee of the Drug Enforcement Administration" (John Rubio). Viewing the evidence in the light most favorable to the Government, but in a manner not inconsistent with the jury's verdict, the testimony concerning the transaction in question (related exclusively by Legarreta) was as follows:

At approximately 5:30 p.m. on July 16, 1971, Legarreta and Rubio met Defendant Pena at the New Manhattan Lounge in Houston, Texas. After a "general conversation on different topics", Legarreta offered to purchase two ounces of heroin from Pena for $1200.00. Pena indicated that he would be able to furnish such a quantity.

The three individuals remained at the bar until approximately 6:30 p.m., when Legarreta asked Pena where

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the heroin was. Pena went to a telephone, made two phone calls, and returned to the bar advising Legarreta that "he could not find Vincente." Thereupon, Pena excused himself and left the lounge, indicating that he was going to look for Vincente. Approximately ten minutes later, Pena returned, accompanied by Ruben Rubio (no relationship to John Rubio). At this point Pena allegedly advised Legarreta that he had located Vincente and that he would soon be coming to the bar with the heroin.

The four individuals (Pena, Legarreta, John Rubio and Ruben Rubio) sat at a table in the lounge and waited. At approximately 8:30 p.m. Vincente Vega arrived at the bar, proceeded to the table where the other individuals were seated, greeted them, and apologized for being late. Vega was accompanied by one Adan Garza. Legarreta asked Vega if he had brought the heroin with him and Vega advised that he had not. A short time later Vega left the bar, allegedly to go get the heroin. He returned at approximately 8:55 p.m. and proceeded directly to the men's restroom. Pena then got up from the table and followed Vega into the restroom. Legarreta followed both of them.

As he opened the bathroom door, Legarreta reportedly observed Vega placing two packages on a little shelf or ledge inside the restroom. Vega then left the room. At this point, Pena reached up to the same little shelf and took down the packages that Vega had left there. He handed the packages to Legarreta and Legarreta in turn handed Pena a package containing $1200.00. Significantly, Pena did not count the money, but simply put it in his pocket.

2. Defendant Pena's Defense

Pena's version of the events varied only slightly from Legarreta's description in terms of factual details, but drastically in terms of legal consequences. Essentially, Pena's defense was that he had been "framed" by John Rubio the "special employee" of the DEA. Apparently, Rubio had been laboring under the misapprehension that Pena was responsible for the death of Rubio's brother-in-law, Manuel Romo. Seeking retribution for the unavenged slaying, Rubio had "set up" Pena in the following manner. Rubio advised Pena that he (Rubio) was to receive some reward money from Legarreta. Since Rubio did not have a residence at the time, he asked Pena to receive the money from Legarreta and hold it for Rubio until the latter obtained a safe place to keep it. Meanwhile, of course, Rubio had told Legarreta that he had negotiated a transaction with Pena whereby Legarreta would be able to purchase some heroin from Pena. Thus, when Legarreta handed the package of money to Pena, Legarreta would think he was effecting payment for a heroin purchase; Pena would think he was merely doing a favor for a friend, never realizing he was participating in an illicit narcotics deal. According to Pena's testimony, all he did was to receive a package of money from Legarreta which he subsequently delivered to Rubio, never realizing that his actions were part of a heroin sale transaction.

3. The Excluded Testimony

As explained above, Pena's defense was that he had been framed by John Rubio, who was seeking revenge for the death of his brother-in-law, Manuel Romo. Rubio's

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scheme had proceeded smoothly, according to this theory, until he discovered that Pena had not been responsible for Romo's death after all. At that point, Rubio contacted Pena, and the BNDD and advised them of what he had done. Rubio also confessed his shenanigans to Jessie Garcia, a mutual friend of Rubio's and Pena's. The Government determined to proceed with the prosecution anyway, however, and, accordingly, John Rubio dropped out of sight.

With Rubio unavailable as a witness (since he could not be located), Pena's lawyer called Jessie Garcia as a witness for the defense. Garcia had known John Rubio since 1958. During November of 1971, Garcia had encountered Rubio at a restaurant in Victoria, Texas, and Rubio had confessed to Garcia the frame-up of Pena. When counsel for Pena solicited this testimony during trial, the Judge refused to allow Garcia to tell the jury about his conversation with Rubio. The jury was removed from the courtroom and the following testimony was proffered into the record outside the presence of the jury:

> "Q. (By Mr. Bates): Mr. Garcia, as a result of the conversation that you had, what, in effect, did Mr. John Rubio tell you with regard to Albert John Pena and this case?
> A. (By Mr. Garcia): Well, like I said, I ran into him in this restaurant and I asked him about Albert, how he was doing and all this, and he was drinking a beer and having something to eat there, and so was I, and —
> Q. (interrupting) Speak up a little so we can hear you.
> A.— this other friend of mine, you see, we had stopped by there to eat — I usually stop by there

most of the time — and I asked him about Albert, and he told me that he gotten even with Albert on account of he believed that Albert had killed his brother, or something like this.
Q. How did he get even with Albert?
A. He told me that he set him up on selling something or other, and that Albert was supposed to pick up some money from some police officer, but that he didn't know that the man that was going to turn him over some money was a police officer.
Q. Okay. And he told you that he had set Albert up?
A. Yes, sir.
Q. That he had, in fact, supplied the heroin that was sold — or, the substance that was sold, and that he got the money from Albert?
A. That—
Q. (interrupting) John Rubio had gotten the money back from Albert?
A. Well, he told me that he had gotten the money back from Albert, yes.
Q. All right.

MR. BATES: That is, in substance, the conversation, Your Honor." (Tr. 187-188).

Obviously, the above quoted testimony was crucial to Pena's defense. The trial court refused to allow the jury to hear that testimony, however, apparently because, in his view, such statements would be inadmissible hearsay.

4. The Trial

Although the transaction in question allegedly occurred on July 15, 1971, the case was not finally tried until January 20, 1975, fully three years after the indictment was returned and approximately forty-four (44) months

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after the events forming the basis of the criminal prosecution. The chronology of the case was as follows:

July 16, 1971	Offense allegedly committed
November 3, 1971	Defendant Pena arrested
November 4, 1971	Complaint filed
January 26, 1972	Indictment returned
February 22, 1972	Pre-trial conference held; Defendants announce ready for trial within sixty days
February 25, 1972	Arraignment
August 20, 1973	Co-Defendant Vega files Motion for Continuance; granted for sixty days
October 20, 1973	Co-Defendant Vega files Second Motion for Continuance; granted
June 4-6, 1974	First Trial, ending in hung jury
October 26, 1974	Witness Ruben Rubio dies
January 20, 1975	Retrial held resulting in conviction

Of particular importance to this Application is the fact that Ruben Rubio (not to be confused with John Rubio, the "special employee" of the Government) died on October 26, 1974, nearly five months after the original mistrial, and was, therefore, unavailable to give testimony at the late-January retrial. Ruben Rubio had been present at the New Manhaten Lounge on the night of July 16, 1971, and had sat at the table where the negotiations concerning the heroin transaction were allegedly con-

ducted. Thus, his testimony would have been material in reconciling the differences between Legarreta's testimony and that of Pena regarding the conversations at the table.

5. The Jury's Verdict

Co-defendant Vincente Vega, who was tried with Pena, was acquitted by the jury, but Pena was convicted on all three counts and sentenced to serve eight (8) years confinement on Count I, with imposition of sentence suspended as to Counts II and III.[1] The acquittal of Vega is significant, because it establishes beyond doubt that the jury did not believe Legarreta's testimony altogether. If the jury had found Legarretta's testimony to be fully credible, there was no conceivable basis for acquitting Vega, since Legarreta had testified that he had initially discussed the transaction with Vega (not Pena), that Vega had gone to pick up the heroin, that Vega had brought the heroin to the lounge and that he had seen Vega place the packages of heroin on the shelf in the men's room. If the jury had believed this testimony, it could not have acquitted Vega. Therefore it is clear that the conviction of Pena rested solely on the testimony of a witness who the jury found had given incredible testimony, at least in part.

The United States Court of Appeals for the Fifth Circuit affirmed the conviction of Pena on Counts I and II and reversed on Count III. From that judgment this Application for Writ of Certiorari has been duly perfected.

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1. The conviction on Count III was reversed by the Fifth Circuit for insufficiency of the evidence.

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REASONS FOR GRANTING THE WRIT

(1) As To Rule 804(b)(3) Issue

Rule 804(b)(3) of the new Federal Rules of Evidence[2] provides as follows:

> "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) "A statement which was at the time of making so far contrary to the declarant's pecuniary or proprietary interest, or *so far tended to subject him to civil or criminal liability* or to render invalid a claim by him against another or *to make him an object of hatred, ridicule or disgrace,* that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated."

There can be no serious dispute that Rubio's declarations to Garcia were significantly self-incriminatory. His statements to Garcia could have formed the basis of Federal prosecutions under any of a number of criminal statutes, including, for example, obstruction of criminal investigations (18 U.S.C.A. §1510), embezzlement from the United States (18 U.S.C.A. §641), fraud (18 U.S. C.A. §1003), and a number of other potentially indictable offenses. Further, Rubio's admissions to Garcia ob-

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2. Although the new Federal Rules of Evidence were not generally in effect at the time of the defendant's trial, the Fifth Circuit had previously adopted the hearsay portion of the new rules for that Circuit. See United States v. Williams, 5 Cir., en banc, 1971, 447 F.2d 1285, 1291.

viously would tend to make Rubio "an object of hatred, ridicule or disgrace," since individuals who go about framing or "setting up" their ostensible friends to be subjected to contrived narcotics busts are not generally well regarded in the community of their peers. Thus, Rubio's statements to Garcia fit precisely within the contemplation of Rule 804(b)(3),[3] and the defense has continually so urged.

Prior to the adoption of the new Federal Rules of Evidence, the applicability and scope of the "declaration against interest" exception to the hearsay rule was somewhat in doubt. In 1913 this Court had held that such exception to the hearsay rule would not be recognized in the federal courts. *Donnelly v. United States,* 1913, 228 U.S. 243, 33 S.Ct. 449. That rule (and the common law doctrine on which it was based) were finally and definitively abrogated by new Rule 804, a development which reflected the modern trend adopted by a majority of the

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3. To the extent that the exception here depends upon a declaration against penal interests and must therefore be corroborated, such corroboration was clearly present in this case. Legarreta testified that Rubio had contacted the BNDD and advised them that he had "set up" Pena and he had made a similar statement to Pena. Further, Rubio's flight after making the statements to Garcia tended to corroborate Garcia's testimony, since flight is indicative of guilty conscience.

Additionally, Vega's testimony at trial *which the jury obviously believed* indicated a lack of knowledge on Pena's part concerning Rubio's confession. Finally, the testimony concerning the absence of a shelf in the men's room at the New Manhattan Lounge, indicating that the heroin transferred, if at all, in a manner other than as described by Legarreta buttressed Rubio's self-indicting declarations. "The sheer number of independent confessions provided additional corroboration for each." Chambers v. Mississippi, supra, 410 U.S. at 300, 93 S.Ct. at 1048.

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federal circuits,[4] a substantial number of state courts[5] and the unanimous consensus of the commentators,[6] rejecting the *Donnelly* rule and adopting the dissent of Mr. Justice Holmes in that case. Indeed, the Supreme Court itself seems to have substantially abandoned the rationale of *Donnelly*, if not the holding thereof, in *United States v. Harris*, 1971, 403 U.S. 573, 584, 91 S.Ct. 2075, 2082, 29 L.Ed.2d 723.

As a result of *Donnelly*, however, there is a dirth of case law interpreting the scope and applicability of the "declarations against interest" exception to the hearsay

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4. United States v. Seyfried, 435 F.2d 696 (7th Cir.), cert. denied 402 U.S. 912 (1971); Scolari v. United States, 406 F.2d 563, 564 (9th Cir.), cert. denied, 395 U.S. 981 (1969); United States v. Dovico, 261 F.Supp. 862 (S.D.N.Y. 1966), aff'd., 380 F.2d 325, 327 n.2 (2d Cir.), cert. denied, 389 U.S. 944 (1967); United States v. Annunziato, 293 F.2d 373 (2d Cir.) (per Friendly, J.), cert. denied, 368 U.S. 919 (1961); Mason v. United States, 257 F.2d 359, 360 (10th Cir.), cert. denied, 358 U.S. 831 (1958); Sucher Packing Co. v. Manufacturing Cas. Ins. Co., 245 F.2d 513, 521-22 (6th Cir. 1957), cert. denied, 355 U.S. 956 (1958).

5. Hines v. Virginia, 136 Va. 728, 743, 117 S.E. 843, 847 (1923). See also, Deike v. Great Atlantic & Pac. Tea Co., 3 Ariz. App. 430, 415 P.2d 145 (1966) (dictum); People v. Spriggs, 36 Cal. Rptr. 841, 389 P.2d 377, 60 Cal. 2d 868 (1964) (Traynor, C.J.); State v. Larsen, 91 Idaho 42, 415 P.2d 685 (1966); People v. Lettrich, 413 Ill. 172, 108 N.E.2d 488 (1952); Thomas v. Maryland, 186 Md. 446, 47 A.2d 43 (1946); Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); State v. Sejuelas, 94 N.J. Super. 576, 229 A.2d 659 (1967); Cameron v. State, 153 Tex. Crim. App. 29, 217 S.W.2d 23 (1949); People v. Brown, 26 N.Y.2d 88, 308 N.Y.S.2d 825, 257 N.E.2d 16 (1970).

6. C. McCormick, Evidence 549-53 (1954); Model Code of Evidence Rule 509(1) (1943); Uniform Rules of Evidence Rule 63(10); Morgan, Declarations Against Interest, 5 Vand. L. Rev. 451 (1952); Wright, Uniform Rules and Hearsay, 26 U. Cinn. L. Rev. 575 (1957); Orfield, The Hearsay Rule in Federal Criminal Cases, 32 Ford. L. Rev. 499, 769 (1964).

rule, which is now, by virtue of Rule 804, applicable in federal criminal cases. Thus, there presently exists a void of interpretative precedent and a consequent manifest need for Supreme Court explication of the parameters of the exception. The present case starkly demonstrates the problem: the Fifth Circuit concedes that the excluded statements could form the basis for a federal prosecution, but notes that "there are possible explanations of Rubio's receipt of money which are inconsistent with culpability on his part." Since the incriminating or inculpatory nature of the remarks is not "clear", however, the Fifth Circuit held that the "declarations against interest" exception to the hearsay rule was not applicable.

Obviously, the Fifth Circuit had no Supreme Court precedent on which to rely in resolving the issue at hand. If the standard controlling admissibility of hearsay declarations under this exception is that such statements are inadmissible unless *unequivocally* incriminating, the Fifth Circuit may be correct in its ruling that Rubio's confessions to Garcia did not come within the exception. If, on the other hand, the proper standard is *"arguably inculpatory"*, the Fifth Circuit position is clearly erroneous and the Petitioner should be granted a new trial. If some intermediate standard applies, the precise formulation of such a rule would govern the proper disposition of this case. At all events, this case presents an ideal occasion for this Court to educate the bar and the lower courts regarding the scope of this newly promulgated federal evidentiary rule and the criteria and standards governing its applicability.

Rule 804 constitutes one of the very few outright abandonments of prior law embodied in the new Federal

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Rules of Evidence. Prior Supreme Court pronouncements in the area are of virtually no assistance in divining the applicability and scope of the new rule, since the antecedent law (*Donnelly*) has been specifically discarded by the new rule. In this context, Supreme Court review of the instant case is plainly indicated.

(2) As To Chambers v. Mississippi Issue

In *Chambers v. Mississippi,* 1973, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297, this Court ruled that in circumstances "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302, 93 S. Ct. at 1049.[7] In that case the state court refused, on hearsay grounds, to admit into evidence testimony to the effect that someone other than the defendant had confessed (on three separate occasions and in writing) to the murder of which the defendant had been convicted. Since this testimony was so "critical to Chambers' defense," this Court reversed the conviction, holding that since "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," the exclusion of the crucial, admittedly hearsay, evidence coupled with other procedural obstacles to the defense, "denied [Chambers] a trial in accord with traditional and fundamental standards of due process."

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7. In support of this proposition the Chambers opinion cites Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); and In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed 682 (1948). See also Specht v. Patterson, 1967, 386 U.S. 605, 610; Ferguson v. State, 1961, 365 U.S. 570; In re Oliver, 1948, 333 U.S. 257, 273; Jenkins v. McKeithen, 1969, 395 U.S. 411, 429 (opinion of Marshall, J.); Brady v. Maryland, 1963, 373 U.S. 83.

In the present case the Petitioner argued that even if Garcia's testimony would contravene the technical requirements of the hearsay rule, such testimony was so critical to the defense and so well independently corroborated that application of the hearsay rule under such circumstances would constitute a violation of due process and deprive the Defendant of a fair trial, particularly in view of the fact that the jury disbelieved the Government's key witness, at least in part, as was evidenced by its acquittal of the Co-Defendant. In these circumstances, the Defendant argued, *Chambers v. Mississippi* demanded that the testimony be admitted, accompanied by an appropriate cautionary instruction from the District Court.

The Fifth Circuit rejected the *Chambers* argument, holding that the *Chambers* doctrine is an exceptionally limited one and that the principles announced in that case have application only in the very aggravated fact situation presented by that case. Admittedly, the Supreme Court did state in *Chambers* that its holding was compelled by "the facts and circumstances of this case", but the constitutional principles requiring the result in *Chambers* are clearly more wide reaching than the Fifth Circuit seems to have recognized in its opinion in the instant case.

Nonetheless, the *Chambers* case does not explicitly delineate its own parameters. Whether and to what extent a *Chambers*-type exception to the hearsay rule is called for in a given situation, such as the case at Bar, where the excluded testimony is "crucial" to the defense, arguably a declaration against penal interests, but admittedly not as demonstrably reliable as the proffered testimony in

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Chambers, is still an open question, and one clearly needing explication by this Court.

Thus, this case presents an important question of constitutional magnitude and far reaching significance concerning the extent to which the Due Process Clause forbids mechanical application of a hearsay rule where its invocation in a particular situation frustrates the accused's ability to present an affirmative defense.

(3) As To Speedy Retrial Issue

Although this Court has considered speedy trial claims on at least ten occasions,[8] it has never confronted the issue in the context of an asserted denial of rights to a prompt *re*trial. Given the high incidence of such occurrences and the distinctiveness of the constitutional and practical considerations governing disposition of such claims, the Supreme Court review of this case, which squarely presents the speedy *re*trial issue, offers a suitable occasion for the Court to address itself to this matter of such great importance to the administration of criminal justice.

This Court has previously characterized the right to a speedy trial as "one of the most basic rights preserved by our Constitution," *Klopfer v. North Carolina,* 1967, 386 U.S. 213, 87 S.Ct. 988, and "as fundamental as any of the rights secured by the Sixth Amendment." *Id.,* 386

8. Beavers v. Haubert, 198 U.S. 77 (1905); Pollard v. United States, 352 U.S. 354 (1957); United States v. Ewell, 383 U.S. 116 (1966); Klopfer v. North Carolina, 386 U.S. 213 (1967); Smith v. Hooey, 393 U.S. 374 (1969); Dickey v. Florida, 398 U.S. 30 (1970); United States v. Marion, 404 U.S. 307 (1971); Barker v. Wingo, 407 U.S. 514 (1972); Moore v. Arizona, 414 U.S. 25 (1973); Strunk v. United States, 412 U.S. 434 (1973).

U.S. at 223, 87 S.Ct. at 993. The Court has never deviated from its emphatic insistence that the public interest in effective law enforcement and the accused's irreplaceable right to swift exoneration, if innocent, both demand that criminal prosecutions to be undertaken with the maximum dispatch consistent with a fair opportunity to prepare.

Important as is the requirement of a speedy trial in the first instance, situations involving a retrial after mistrial present even more compelling reasons for expeditious disposition. In the first place, the very fact that there has been a previous trial indicates that both sides are ready to proceed and that sufficient time has already passed for adequate preparation. Secondly, since both sides have previously seen the opposition's case at the first trial, there is increased danger of manipulative strategy being developed during the hiatus following an initial trial. Thirdly, because most or all witnesses have previously testified under oath, the second trial requires witnesses to have fresh memories not only concerning the events in question but also concerning their testimony at the original trial.

Thus, both constitutional requirement and practical efficiencies demand that criminal retrials must be accorded the highest priority in being heard. This obvious principle has been underscored by the United States Court of Appeals for the Second Circuit, the only appellate Court yet to address itself to the substantial policy considerations presented in retrial situations. In *United States v. Drummond*, 2 Cir., 1975, 511 F.2d 1049, that Court pointed out that "the Government will be ready without delay to retry most Defendants who obtain reversals on

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appeal. By hypothesis, the Government usually has recently concluded trials on these cases. Thus, to emphasize the Government's need to be ready would generally be an empty formality. Moreover, cases ordered for retrial are probably, though not necessarily, of older vintage than those scheduled for initial trial. Accordingly, it would be in the public interest to retry them promptly to avoid the risk that evidence might disappear or witnesses' recollections be dimmed. In short, both the plain language of Rule 6 and the policy behind it require us to [construe the rule strictly]."

Indeed, the Plan for the United States District Court for the Southern District of Texas for Achieving Prompt Disposition of Criminal Cases provides:

> "7. *Retrials.* Where a new trial has been ordered by the District Court or a trial or a new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than ninety days after the order therefor becomes final unless extended under Section 3."

The wording difference between Section 7 of the Local Plan (the portion governing retrials) and Section 2(b) (the section governing trials) is significant, for it underscores the priority to be accorded to criminal retrial. Section 2(b) provides that the "trial shall commence within sixty days after a plea of not guilty, if the Defendant is held in custody, or within ninety days if he is not in custody." Section 7 provides that the trial "shall commence at the earliest practicable time, *but in any event not later than* ninety days after the order therefor becomes final * * *."

Nevertheless, and despite the requirements of the Local Plan, the retrial was not held in this case until 228 days (seven and one-half months) after the original trial and 138 days (four and one-half months) after the deadline established by the Local Plan. Meanwhile, on October 24, 1974,—nearly two months after the date the retrial should have commenced—a potentially significant defense witness was killed.

The situation was even more aggravated by the fact that the original trial had been so long delayed. Thus, by the time the retrial should have commenced, the case was already venerable, thirty months having by then elapsed since the arraignment. This prior inordinate delay exacerbated the situation and underscored the necessity for a prompt retrial.

In this context, the Supreme Court should grant a Writ of Certiorari to consider and promulgate guidelines concerning this manifestly important area of criminal procedure to which the Court has not heretofore addressed itself.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

PHILIP S. GREENE

GERALD M. BIRNBERG

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APPENDIX I

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALBERT JOHN PENA,
Defendant-Appellant.

NO. 75-1608.

United States Court of Appeals,
Fifth Circuit.

March 3, 1976.

By a judgment of the United States District Court for the Southern District of Texas, at Houston, William M. Steger, J., sitting by designation, the defendant was convicted of distribution of heroin, possession with intent to distribute heroin and conspiracy to distribute heroin and he appealed. The Court of Appeals, 525 F.2d 692, remanded for supplemental findings of fact. After supplemental findings by the District Court, the Court of Appeals, Clark, Circuit Judge, held, inter alia, that unavailable informant's alleged statement to defense witness that he had set defendant up was inadmissible as hearsay, that defendant had not been denied a speedy trial under either the court plan or Constitution, and that the evidence was insufficient to sustain conviction of defendant, after acquittal of his codefendant, on conspiracy count.

Affirmed in part and reversed in part.

* * *

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, CLARK and RONEY, Circuit Judges.

CLARK, Circuit Judge:

Albert John Pena was convicted by a jury on a three-count indictment charging distribution of heroin, possession with intent to distribute heroin and conspiracy to distribute heroin. 21 U.S.C. §§841(a)(1), 846. He received an 8-year sentence on Count I (distribution). Imposition of sentence on Counts II and III (possession and conspiracy) was suspended. In this direct appeal, Pena raises four issues for review, claiming that: (1) testimony concerning a statement made by a confidential informant was improperly excluded; (2) the delay preceding trial and retrial violated the local plan of the Southern District of Texas and the Sixth Amendment; (3) the evidence was insufficient to sustain a conviction on the conspiracy count; and (4) the charge to the jury was erroneous and insufficient. Finding merit with regard to issue (3) only, we reverse as to Count III (conspiracy) and affirm the conviction in all other respects.

The charges against Pena grew out of a heroin transaction alleged to have taken place at the New Manhattan Lounge in Houston, Texas, on July 16, 1971. Viewing the evidence in the light most favorable to the government, we can distill the following salient facts from testimony of Officer Legarreta, a special DEA undercover agent. Legarreta testified that early in the evening, he and John Rubio, a confidential informant, met with Pena and arranged for the defendant to supply them with two ounces

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of heroin. To secure the drug, Pena attempted to locate Vincente Vega. At one point, defendant left the lounge and returned with Ruben Rubio (no relation to John Rubio, the informant). The four men waited until Vega arrived, accompanied by Adan Garza. Vega told Legarreta that he did not have the heroin with him; he left shortly thereafter, allegedly to pick up the contraband. When Vega returned, he went directly to the men's restroom. Pena followed Vega, with Legarreta close behind both men. As he opened the bathroom door, Legarreta saw Vega place two packages on a shelf and leave the room. Pena took down the packages and handed them to Legarreta in exchange for a package containing $1200. It was later established that the packages handed to Legarreta by Pena contained heroin.

Pena's version of the incident is not totally dissimilar. The crucial difference is that Pana claims that he never handed the officer a package but merely took the money from Legarreta in his capacity as agent for John Rubio. According to the defendant, John Rubio mistakenly believed that Pena had killed his brother-in-law. To avenge this death, Rubio decided to frame Pena by requesting that the defendant receive some "reward" money from Legarreta and hold it for Rubio until he, Rubio, could find a safe place to store it. Pena claims he simply performed this task and delivered the money to Rubio, never aware that he was involved in an illegal drug transaction. In support of his defensive theory, Pena sought to introduce testimony establishing that in November of 1971 Rubio confessed his role in the "setup" after realizing that Pena was not responsible for his brother-in-law's death. Rubio did not testify at trial, having dropped out of sight shortly after his alleged con-

fession. The jury chose to reject Pena's defense and returned a guilty verdict on all counts. Vincente Vega, Pena's co-defendant, was found not guilty.

I. TESTIMONY OF JESSE GARCIA

As his first assignment of error, Pena contends that the trial judge erroneously excluded a crucial portion of the testimony of defense witness Jesse Garcia, a mutual friend of Pena and Vega. On direct examination, Garcia testified that he spoke with the informant Rubio at a restaurant in November 1971. Defense counsel then asked Garcia to relate the substance of his conversation with Rubio as it related to Pena. The government objected on the basis that the informant's out-of-court declaration was hearsay. The court sustained the objection. For purposes of this appeal, defendant adduced the following testimony from Garcia outside the presence of the jury.

Q. Mr. Garcia, as a result of the conversation that you had, what, in effect, did Mr. John Rubio tell you with regard to Albert John Pena and this case?
A. Well, like I said, I ran into him in this restaurant and I asked him about Albert, how he was doing and all this, and he was drinking a beer and having something to eat there, and so was I, and—
Q. (interrupting) Speak up a little so we can hear you.
A. —this other friend of mine, you see, we had stopped by there to eat—I usually stop by there most of the time—and I asked him about Albert, and he told me that he had gotten even with Albert on account of he believed that Albert had killed his brother, or something like this.
Q. How did he get even with Albert?

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A. He told me that he had set him up on selling something or other, and that Albert was supposed to pick up some money from some police officer, but that he didn't know that the man that was going to turn him over some money was a police officer.
Q. Okay. And he told you that he had set Albert up?
A. Yes, sir.
Q. That he had, in fact, supplied the heroin that was sold—or, the substance that was sold, and that he got the money from Albert?
A. That—
Q. (interrupting) John Rubio had gotten the money back from Albert?
A. Well, he told me that he had gotten the money back from Albert, yes.
Q. All right.

Pena challenges the trial court's evidentiary ruling on three grounds. First, he claims that the statements are not hearsay but rather fall under the non-hearsay rubric of admissions of a party-opponent. Second, even if the statement is hearsay, Pena claims it is admissible as a declaration against penal interest. Third, Pena contends that the exclusion of Garcia's testimony deprived him of a fair trial and violated his due process rights as enunciated by the Supreme Court in *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

[1, 2] While not unrelated, each contention requires separate treatment. It is undisputed that a party's out-of-court admission is admissible against him and is not generally considered to be hearsay. *See generally* C. McCormick, Evidence, § 262 at 628-631 (Cleary ed. 1972). In many instances, the statement of an agent of a party will likewise be admissible as a vicarious or representative

admission of his principal. *See generally* C. McCormick, Evidence, § 267 at 639-47 (Cleary ed. 1972). The new Federal Rules of Evidence provide that "a statement is not hearsay if . . . the statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or . . . (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2).

[3] In this case, Pena argues that since Rubio was employed as a "special employee of the DEA," his statements should be imputed to the government. In other contexts, the government has been charged with the consequences of actions of informants who assist law enforcement officers in detecting crime, even though the informant is not a regular employee and is paid on a "cash and carry" basis. *See Sherman v. United States,* 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); *United States v. Gomez-Rojas,* 507 F.2d 1213 (5th Cir. 1975) (entrapment). The court has not decided, however, whether such persons should be deemed agents of the United States for purposes of the rule as to vicarious admissions by a party-opponent. We do not reach that issue today. Even assuming for the sake of discussion that Rubio's status as an informant carried with it the power to make admissions on the government's behalf, the statements in question were made at a time when his relationship with the government had ceased. The prohibited transaction occurred in July; Rubio's conversation with Garcia was asserted to have taken place sometime in November. In the interim, Rubio apparently had no significant contacts with his "employers," with the exception of a single telephone call to an agent at the BNDD (DEA's predeces-

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sor). His November statement did not concern "a matter within the scope of his agency . . . made during the existence of the relationship" and thus may not be saved from its hearsay status by the rule on admissions.

[4] Similarly, Pena is not aided by the analogy of the new federal evidence rule creating a hearsay exception for declarations against penal interest. The rule renders admissible any "statement which . . . so far tended to subject [the declarant] to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." Fed. R.Evid. 804(b)(3). Assuming *arguendo* that this court might choose to be guided by the rule in a case which arose prior to its effective date, it is clear that Rubio's statements were not sufficiently self-incriminatory to fall within the ambit of the rule. The proffered testimony discloses only that Rubio admitted that he had gotten even with Pena by "setting him up" to be accused of selling something. There is no showing that Rubio falsified evidence; nor was it shown that Rubio involved Pena in a drug transaction without Pena's knowledge. Rubio could well have been discharging his proper role as an informant and at the same time intending to use his status to "get even" with one he believed had killed his brother-in-law. It is not a crime for an informant to assist narcotics agents in "setting up" or trapping a drug dealer if the means employed are lawful, even if his motives are not totally faithful to the government. Rubio's personal motives for helping the government "make this case" against Pena, while vengeful, do not tend to subject Rubio to criminal liability.

[5] The statement attributed to Rubio to the effect that he got the money back from Pena is somewhat more trou-

blesome. Pena suggests that the statement could form the basis for a federal prosecution against Rubio for embezzlement from the United States. Such a construction is not justified from the scanty tender shown by the record. The barebones statement is at best ambiguous. It does not purport to tell what Rubio did with the money once he received it from Pena. Without attempting to reconstruct the post-offense relationship of Pena and Rubio, we note that there are possible explanations of Rubio's receipt of money which are inconsistent with culpability on his part. For example, to complete his job as informant-participant, Rubio may have delivered the payment to the ultimate supplier of the heroin or he may have returned it to Legarreta. In any event, the recount of Rubio's conversation with Garcia contained neither a confession nor a clear inculpatory remark which would exempt it from the normal rule against admitting hearsay testimony of an available declarant.

[6] Finally, we conclude that the exclusion of Garcia's testimony did not violate defendant's due process rights to a fair trial. In *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the United States Supreme Court recognized that a technical application of the exclusionary hearsay rules may contribute to denial of justice if the excluded evidence "bore persuasive assurances of trustworthiness" and was critical to the defendant's case. *Id.* 410 U.S. at 302, 93 S.Ct. 1049. In examining the excluded confession in *Chambers*, the Court delineated several factors which are relevant to a determination of trustworthiness. When and to whom the statement is made is important, as is the presence or absence of corroborating evidence. Further, if the declarant is available to testify, there is less liklihood that the jury

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will attach undue weight to the evidence. Finally, whether the confession is "in a very real sense self-incriminatory and unquestionably against interest" is a significant indicator of reliability. *Id.* 410 U.S. at 300-301, 93 S.Ct. at 1048.

The inquiry must necessarily be conducted on a case-by-case basis. The *Chambers* Court itself limited its holding to "the facts and circumstances of his case. . . ." *Id.* 410 U.S. at 303, 93 S.Ct. at 1049. In this case, Pena argues that Garcia's testimony would have bolstered his claim that Rubio had "framed" him and retained the reward money as part of a scheme to deceive both the government and Pena. It is possible, of course, that the excluded testimony may have proven helpful to the defense, although we cannot tell from the limited proffer the extent to which Rubio's statements were consistent with Pena's defensive theory. But favorableness to the defense is not the decisive factor in the *Chambers* analysis.

[7] In the case *sub judice*, there is not sufficient assurance that the excluded testimony was reliable. Although Rubio's statements were made to a friend whom he presumably trusted, their conversation did not take place until several months after the transaction. Aside from Pena's own testimony, the only other corroborating evidence is a vague reference to a telephone call Rubio made to the BNDD in which the informant supposedly related that he had disclosed his role in the transaction to Pena and informed the defendant that Legarreta was a narcotics officer. At the time of trial, Rubio's whereabouts were unknown and the jury did not have the opportunity to observe his demeanor and assess his credibility. Most significantly, an examination of the proffer reveals that Rubio's

so-called confession was not so clearly self-incriminatory or against his interest as to convince this court that he would not have made the statement if it were untrue.

[8] The record before us will not support a conclusion that the exclusion of this hearsay unfairly deprived defendant of an opportunity to present his theory of the case to the jury. *See Truman v. Wainwright,* 514 F.2d 150 (5th Cir. 1975); *Maness v. Wainwright,* 512 F.2d 88 (5th Cir. 1975). The proffered testimony does not fall within any exception to the hearsay exclusionary rule and thus was properly classified as inadmissible.

II. SPEEDY TRIAL

Pena's speedy trial challenge is two-fold. He asserts that the delays preceding his trial and retrial were in excess of those provided in the Plan for the United States District Court for the Southern District of Texas for achieving Prompt Disposition of Criminal Cases (the Plan) and were violative of his Sixth Amendment right to a speedy trial.

Over three and one-half years elapsed between the date of the offense and Pena's conviction. The alleged illegal sale of narcotics occurred on July 16, 1971. Pena was arrested on November 3, 1971, and an indictment was returned on January 26, 1972. On February 25, 1972, Pena was arraigned and pled not guilty. On two occasions (August 15, 1973 and October 23, 1973), Pena's co-defendant was granted a 60-day continuance. Pena formally consented to the October continuance. Defendant's first trial, held on June 3-6, 1974, resulted in a mistrial. Pena was retried and convicted on January 20-23, 1975.

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To adequately resolve the Plan violation issue, we remanded this case to the district court for supplemental findings of fact. In an unpublished opinion-order dated December 17, 1975, which effectuated that remand, we analyzed and disposed of Pena's claim concerning the period of delay preceding his original trial.

> The Plan for the Southern District of Texas first became effective on March 9, 1973. At that time, Section 2(b) required that trial commence within 90 days of a plea of not guilty for defendants who were not in custody. When the Plan became effective, more than a year had elapsed since Pena's arraignment. The government's contention that the Plan had no application to cases already docketed on its effective date is not correct. The spirit of the Plan required the court and the prosecutor to try all criminal proceedings including these pending cases as quickly as possible, and nothing in the wording of the Plan excepts them. Indeed, as the oldest pending criminal cases, they should have been accorded no less than the same treatment given to those newly filed.
>
> Nevertheless, the delay preceding the original trial did not warrant dismissal of the indictment. After adoption of the Plan, a postponement of four months was attributable to two defense continuances to which Pena did not object. Trial commenced approximately five and one-half months after these continuance periods ended. While this delay exceeded the 90 days prescribed by the Plan, we must again "take cognizance that the remedial requirements of the Plan were new and that the 'busy districts [the Southern District of Texas had the heaviest pending workload at the time of any district in this Circuit] may find it difficult to operate under them impeccably.'" *United States v. Shepherd*, 511 F.2d 119, 124, n. 6

(5th Cir. 1975), *citing United States v. Rodriguez,* 497 F.2d 172, 176 (5th Cir. 1974). Further, although the Plan could not be disregarded, it is reasonable to expect that districts with impacted dockets would encounter special problems conforming pending cases to the requirements of the Plan. For these reasons, we decline to hold that dismissal of the action would have been the proper order to remedy the delay preceding the original trial.

[9] At that time, the record did not reflect sufficient evidence to indicate whether the delay proceding defendant's retrial constituted a Plan violation of such magnitude as to warrant dismissal of the indictment. The remand for supplemental findings by the district court stated:

> Pena's separate challenge concerning the delay between the date of mistrial and the second trial merits further consideration. Section 7 of the Plan provides:
>
> > Where a new trial has been ordered by the District Court or a trial or a new trial has been ordered by an appellate court, it shall commence at the earliest practicable time but in any event not later than 90 days after the order therefore becomes final unless extended under Section 3.
>
> In this case, the retrial was held 228 days after the original trial and 138 days after the deadline established by Section 7. No written extensions were granted. The record contains no explanation for the delay and the government, in its brief, merely asserts that it cannot be expected to make a showing of the *court's* reasons for delay. That is no answer to defendant's challenge that someone's violation of the Plan entitles him to relief. To enable the district court to develop the facts surrounding the reasons for the 228-day delay in retrying Pena, we remand

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> this proceeding to the district court with directions to conduct any further proceedings it may deem necessary to enable it to supplement the record on appeal in this cause with an order which explicates the facts and factors which produced the over maximum delay in retrial.
>
> As we recognized in *Rodriguez*, there are instances when an exceptionally crowded docket or other unusual conditions will constitute such "exceptional circumstances" as will justify a Section 3 extension of the time limitations. 497 F.2d at 176.

The district court supplemented the record in this court on January 14, 1976, with a memorandum outlining the acutely congested trial docket conditions prevailing in the Southern District of Texas immediately prior to Pena's retrial. The most notable factors contributing to the delay were the impossibility of giving preference to retrials due to a backlog of pending criminal cases and the court's pre-emptive occupation with a major criminal antitrust suit involving multiple defendants. This new evidence shows that "exceptional circumstances" justified an extension of the Plan's time limitations and thus no remedial action will be taken by this court.

[10] Pena's speedy trial constitutional challenge must also fail. The four-pronged test of *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), which is apropos here, provides that the court must balance the following factors in assessing an alleged Sixth Amendment violation: 1) length of delay, 2) reasons for delay, 3) defendant's assertion of his right, 4) prejudice to the defendant.

[11] The period of delay between the date of defendant's arrest and second trial was considerable—over three

years. Much of this delay, however, was attributable to the court's grossly congested docket and Vega's requests for continuances. During this time, defendant never demanded a speedy trial. Rather, he expressly consented to a second continuance by his co-defendant preceding the original trial. Finally, Pena has not convinced this court that he was prejudiced by the delay. Defendant's claim that he lost the testimony of two material witnesses as a result of the delay is not persuasive. Ruben Rubio, a party present at the New Manhattan Lounge the night of the transaction, died on the interval between Pena's first and second trial. Although apparently then available, he was not called by the defense at the first trial and Pena does not explain how the absence of his testimony at the second trial could have been harmful to the defendant. Moreover, there is no showing that the informer Rubio would have been available to testify if the original trial had been held promptly after defendant's arraignment. Our only information is that Rubio disappeared sometime after his conversation with Garcia in November 1971. In sum, despite its length, the delay here does not rise to a level of a constitutional violation.

III. SUFFICIENCY OF THE EVIDENCE—CONSPIRACY COUNT

The jury was properly instructed that if it found one of the defendants not guilty, it could not return a guilty verdict against the other defendant unless it found that he conspired with at least one person other than his now-exonerated co-defendant. There was no charge explaining that a conviction cannot be based on an alleged "conspiracy" between an accused and a government agent or informer. *See United States v. Williamson*, 450 F.2d 585

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(5th Cir. 1971), cert. denied, 405 U.S. 1026, 92 S. Ct. 1297, 31 L.Ed.2d 486 (1972). Pena insists that since his co-defendant Vega was acquitted on the conspiracy count, the only conceivable persons with whom defendant could have conspired were Officer Legarreta or John Rubio, both of whom were government agents. From this premise defendant reasons that the jury based its verdict on this legally untenable conclusion.

Specifically, Pena asks this court to reverse on the basis of the incompleteness of the trial court's instructions with respect to the conspiracy charge. However, the heart of defendant's objection goes to the sufficiency of the evidence and we treat it in that light.

[12] The government attempts to counter Pena's challenge by contending that the evidence did not foreclose the possibility of a conspiracy with persons unknown as charged in the indictment. As possible unknown conspirators, the government suggests the ultimate supplier of heroin and "Don Lupe," the bartender at the New Manhattan Lounge. Neither speculation finds support in the evidence, however. The jury heard no testimony tending to establish that Pena conspired with another specific individual to obtain his supply. Similarly, the only evidence to connect the bartender with Pena is Officer Legarreta's statement on cross-examination that the bartender approached defendant and warned him not to discuss narcotics with people he didn't know. Even viewing this evidence in a light most favorable to the government, it is too slim to convince any reasonable minded juror that Pena was engaged in a conspiracy with "Don Lupe" to distribute heroin. Accordingly, we reverse defendant's conviction on conspiracy and direct the court to remove

the impediment of the sentence imposed and suspended on that count.

IV. JURY INSTRUCTIONS

[13-15] Defendant claims that the charge to the jury was deficient in two respects. First, the following instruction is challenged as impermissibly shifting the burden of proof to the defendant:

> [S]o that if there are two reasonable theories, equally supported by the evidence, one of which is consistent with the guilt of the Defendant and the other conconsistent with his innocence, then you must adopt the theory consistent with his innocence and acquit him, because he could not be said to be guilty "beyond a reasonable doubt."

Since defendant did not object to the court's statement at trial, our review is for plain error only. Fed. R. Crim. P. 52(b). The adequacy of the charge must be judged in its entirety and in light of the proof adduced. Here we find that the court repeatedly emphasized that the burden of proof was on the government. Even if the above portion, standing alone, might appear to shift that burden in certain factual situations, the overall charge given in this case cannot be said to be plainly erroneous. *See United States v. Prince*, 515 F.2d 564, 566-67 (5th Cir. 1975).

[16-18] Finally, defendant complains that the court's refusal to give the defendant's requested charge on entrapment constitutes reversible error. In this circuit, a defendant is entitled to a so-called *Bueno* instruction if he comes forward with sufficient evidence to establish a prima facie

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case that the supplier of contraband was a paid informer or government agent. *United States v. Gomez-Rojas*, 507 F.2d 1213, 1218 (5th Cir. 1975). Pena's defense was that he acted merely as an agent for John Rubio in accepting the money from Legarreta. There was no evidence that John Rubio was a supplier of the heroin transferred. The *Bueno* instruction is not warranted if the government is merely the source of the money used to purchase the narcotics. *See United States v. Workopich*, 479 F.2d 1142, 1144-45 (5th Cir. 1973). Thus the court was correct in refusing defendant's request in this instance.

The convictions of Albert John Pena on Counts I and II and the sentence imposed on Count I are affirmed. The conviction on Count III is reversed.

Affirmed in part, reversed in part.

APPENDIX II

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1608

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALBERT JOHN PENA,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(December 17, 1975)

Before WISDOM, CLARK and RONEY, Circuit Judges.

PER CURIAM:

In this direct criminal appeal, Albert John Pena contends, *inter alia,* that the district court erred in not dismissing his indictment since the periods of delay preceding his trial and retrial were in excess of those provided in the Plan for the United States District Court for the Southern District of Texas for Achieving Prompt Disposi-

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tion of Criminal Cases (the Plan). Over three and one-half years elapsed between the date of the offense and Pena's conviction. The alleged illegal sale of narcotics occurred on July 16, 1971, and an indictment was returned on January 26, 1972. On February 25, 1972, Pena was arraigned and pled not guilty. On two occasions (August 15, 1973 and October 23, 1973), Pena's co-defendant was granted a 60-day continuance. Pena formally consented to the October continuance. Defendant's first trial, held on June 3-6, 1974, resulted in a mistrial. Pena was retried and convicted on January 20-23, 1975.

The Plan for the Southern District of Texas first became effective on March 9, 1973. At that time, Section 2(b) required that trial commence within 90 days of a plea of not guilty for defendants who were not in custody. When the Plan became effective, more than a year had elapsed since Pena's arraignment. The government's contention that the Plan had no application to cases already docketed on its effective date is not correct. The spirit of the Plan required the court and the prosecutor to try all criminal proceedings including these pending cases as quickly as possible, and nothing in the wording of the Plan excepts them. Indeed, as the oldest pending criminal cases, they should have been accorded no less than the same treatment given to those newly filed.

Nevertheless, the delay preceding the original trial did not warrant dismissal of the indictment. After adoption of the Plan, a postponement of four months was attributable to two defense continuances to which Pena did not object. Trial commenced approximately five and one-half months after these continuance periods ended. While this delay exceeded the 90 days prescribed by the Plan, we

must again "take cognizance that the remedial requirements of the Plan were new and that the 'busy districts [the Southern District of Texas had the heaviest pending workload at the time of any district in this Circuit] may find it difficult to operate under them impeccably.'" United States v. Shepherd, 511 F.2d 119, 124 n. 6 (5th Cir. 1975), *citing* United States v. Rodriguez, 497 F.2d 172, 176 (5th Cir. 1974). Further, although the Plan could not be disregarded, it is reasonable to expect that districts with impacted dockets would encounter special problems conforming pending cases to the requirements of the Plan. For these reasons, we decline to hold that dismissal of the action would have been the proper order to remedy the delay preceding the original trial.

Pena's separate challenge concerning the delay between the date of mistrial and the second trial merits further consideration. Section 7 of the Plan provides:

> Where a new trial has been ordered by the District Court or a trial or a new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the order therefore becomes final unless extended under Section 3.

In this case, the retrial was held 228 days after the original trial and 138 days after the deadline established by Section 7. No written extensions were granted. The record contains no explanation for the delay and the government, in its brief, merely asserts that it cannot be expected to make a showing of the *court's* reasons for delay. That is no answer to defendant's challenge that someone's violation of the Plan entitles him to relief. To enable the district court to develop the facts surrounding the reasons for

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the 228-day delay in retrying Pena, we remand this proceeding to the district court with directions to conduct any further proceedings it may deem necessary to enable it to supplement the record on appeal in this cause with an order which explicates the facts and factors which produced the over maximum delay in retrial.

As we recognized in *Rodriguez*, there are instances when an exceptionally crowded docket or other unusual conditions will constitute such "exceptional circumstances" as will justify a Section 3 extension of the time limitations. 497 F.2d at 176. This court retains jurisdiction over all other aspects of this appeal.

REMANDED WITH DIRECTIONS.

APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 75-1608

D. C. Docket No. CR-72-H-20

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALBERT JOHN PENA,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Before WISDOM, CLARK and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part in accordance with the opinion of this Court.

March 3, 1976

Issued as Mandate:

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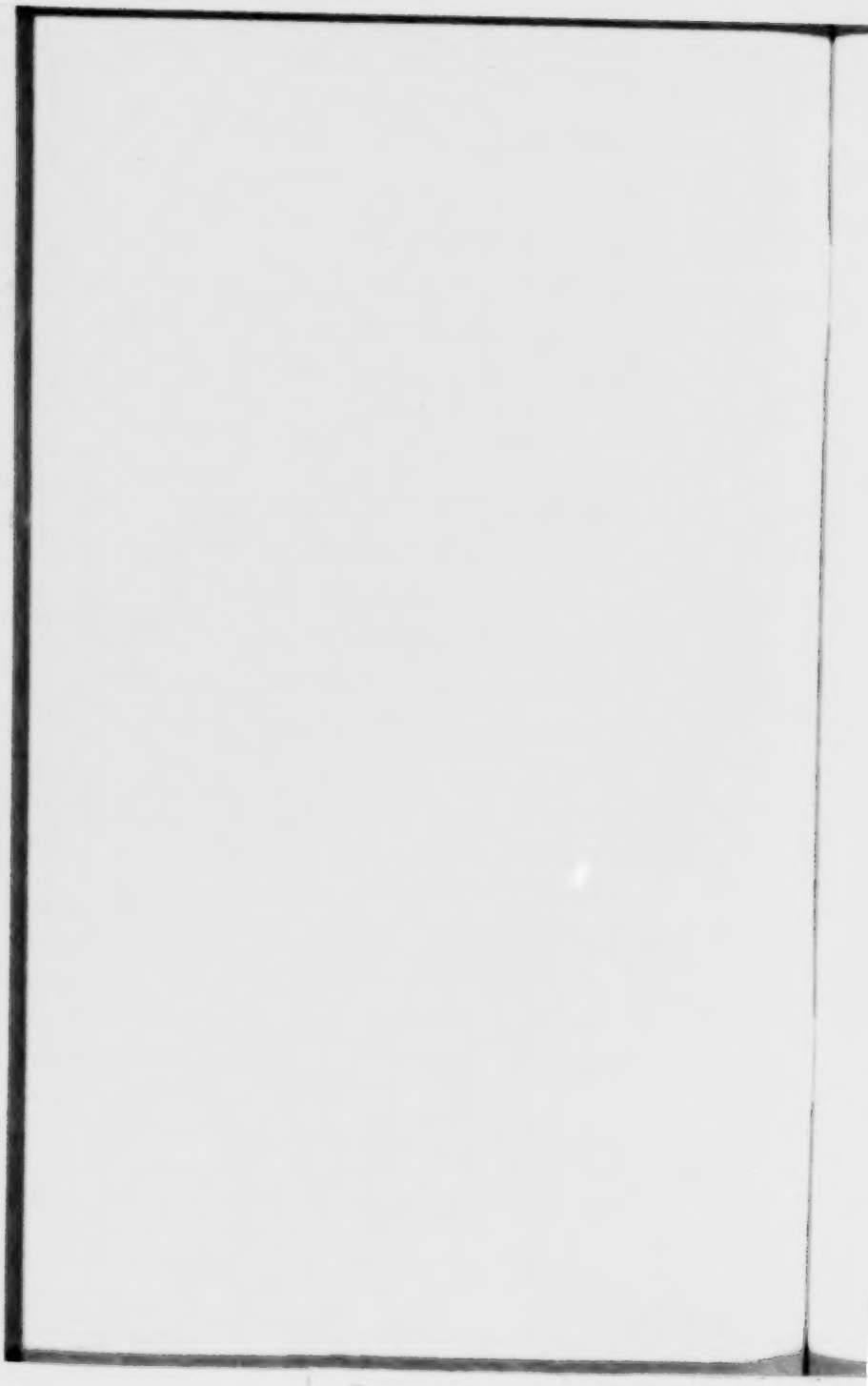
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1400

ALBERT JOHN PENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I) is reported at 527 F. 2d 1356. An earlier opinion of the court of appeals, remanding the case to supplement the record (Pet. App. II), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1976 (Pet. App. III). The petition for a writ of certiorari was filed on April 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether extrajudicial statements of a government informant were properly excluded from evidence.

2. Whether petitioner's right to a speedy trial was violated by a delay of seven and one-half months between his first trial and his retrial.

STATEMENT

Following a second jury trial in January 1975,[1] in the United States District Court for the Southern District of Texas, petitioner was convicted of distribution of heroin (Count 1), possession of heroin with intent to distribute (Count 2), and conspiracy to distribute heroin (Count 3), in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner was sentenced to eight years' imprisonment on Count 1, to be followed by three years' special parole. Sentences on the two remaining counts were suspended. The court of appeals affirmed the convictions on Counts 1 and 2, and reversed the conviction on Count 3 (the conspiracy charge) on the ground of insufficiency of the evidence (Pet. App. 22, 34-37).

1. On July 16, 1971, Joaquin Legarreta, a special agent of the Drug Enforcement Administration (D.E.A.), along with John Rubio, an informant for the D.E.A., met petitioner at a bar in Houston, Texas. When Legarreta offered to purchase two ounces of heroin for $1,200, petitioner said he could supply the drug (Tr. 57-58).[2]

Legarreta asked where the heroin was; petitioner made two telephone calls and then told Legarreta that "he could not find Vincente." Petitioner then left to look for Vincente. Approximately ten minutes later, petitioner returned, stating that he had found Vincente and that the latter would be arriving with the heroin (Tr. 58-59). After Vincente Vega arrived, Legarreta asked whether he had brought the heroin; Vega stated he had not. Vega left shortly thereafter, purportedly to get the heroin. When he returned he went directly to the men's restroom (Tr. 60). Petitioner and Legarreta followed (Tr. 61).

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[1]Petitioner's first trial had ended in a mistrial in June 1974.

[2]All transcript references are to the appendix filed in the court of appeals.

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Legarreta saw Vega place two packages on a shelf inside the restroom and then depart. Petitioner removed the packages from the shelf and handed them to Legarreta, who gave petitioner a package containing $1,200 (Tr. 61-62).

2. Petitioner's defense was that he had been framed by informant Rubio, who mistakenly thought that petitioner was responsible for the death of Rubio's brother-in-law. According to petitioner's version of these events, Rubio had asked petitioner to take a package from Legarreta and hold it for safekeeping. Rubio had said that the package would contain some reward money and that Rubio had no safe place to keep it. Petitioner's testimony was that he never handed the officer a package but merely took the reward money from Legarreta in his capacity as agent for Rubio (Tr. 200), and later gave the money to Rubio (Tr. 202). Petitioner said that he never realized he was participating in a sale of heroin (Tr. 202-203).

At trial, petitioner called Jessie Garcia, a mutual friend of Rubio and petitioner, for the purpose of introducing evidence that, subsequent to the heroin transaction, Rubio had told Garcia of his attempt to get even with petitioner by arranging the heroin transaction. On the grounds that evidence of the conversation constituted inadmissible hearsay,[3] the court refused to allow the jury to hear it. The following proffer was made outside the presence of the jury (Tr. 187-188):

> Q. [By Mr. Bates] Mr. Garcia, as a result of the conversation that you had, what, in effect, did Mr. John Rubio tell you with regard to Albert John Pena and this case?

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[3]At the time of trial Rubio could not be located and did not appear as a witness.

A. [By Mr. Garcia] Well, like I said, I ran into him in this restaurant and I asked him about Albert, how he was doing and all this, and he was drinking a beer and having something to eat there, and so was I, and—

Q. (interrupting) Speak up a little so we can hear you.

A. —this other friend of mine, you see, we had stopped by there to eat—I usually stop by there most of the time—and I asked him about Albert, and he told me that he had gotten even with Albert on account of he believed that Albert had killed his brother, or something like this.

Q. How did he get even with Albert?

A. He told me that he had set him up on selling something or other, and that Albert was supposed to pick up some money from some police officer, but that he didn't know that the man that was going to turn him over some money was a police officer.

Q. Okay. And he told you that he had set Albert up?

A. Yes, sir.

Q. That he had, in fact, supplied the heroin that was sold—or, the substance that was sold, and that he got the money from Albert?

A. That—

Q. (interrupting) John Rubio had gotten the money back from Albert, yes.

Q. All right.

MR. BATES: That is, in substance, the conversation, Your Honor.

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ARGUMENT

1. Petitioner contends (Pet. 11-17) that the district court erred in refusing to admit the testimony of Garcia regarding his conversation with Rubio. He argues that Fed. R. Evid. 804(b)(3) permits the evidence to be introduced as a declaration by Rubio against his penal interest (Pet. 11-15) and, alternatively, that the court's refusal to admit the conversation violated due process under the rationale of *Chambers* v. *Mississippi*, 410 U.S. 284 (Pet. 15-17).

a. The exception to the hearsay rule for third-party declarations against interest has traditionally been limited to declarations against pecuniary and proprietary interests. *E.g.*, *Donnelly* v. *United States*, 228 U.S. 243, 273-276. This rule has been changed by Fed. R. Evid. 804(b)(3), which makes admissible declarations against penal interests in certain circumstances.[4] Since petitioner's trial occurred on January 20, 1975, however, the Federal Rules of Evidence, which did not take effect until July 1975, were not applicable. Instead, the traditional rule applied,[5] and under that rule the evidence was inadmissible.[6]

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[4]Fed. R. Evid. 804(b)(3) renders admissible a hearsay "statement which * * * so far tended to subject [the declarant] to * * * criminal liability * * * that a reasonable man in his position would not have made the statement unless he believed it to be true." The Rule further provides that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

[5]Contrary to petitioner's statement (Pet. 11, n. 2), the Fifth Circuit in *United States* v. *Williams*, 447 F. 2d 1285, did not adopt the rule now embodied in Fed. R. Evid. 804(b)(3). *Williams* deals only with the hearsay aspects of expert testimony and does not mention declarations against interest.

[6]If Rubio's statement were admissible as a declaration against interest, it could be only as a declaration against penal interest, since the statement implicated no pecuniary or proprietary interests of Rubio's.

In any event, petitioner's out-of-court statements to Garcia are inadmissible under the new federal rules. Under Rule 804(b)(3), the relevant inquiry is whether the statement is so against penal interests that a reasonable man in the declarant's position would not have made the statement unless he believed it to be true.[7] Hearsay statements are considered sufficiently against the declarant's penal interest when, for example, they constitute an admission of a particular crime, *United States* v. *Marquez*, 462 F. 2d 893, 895 (C.A. 2), make the declarant subject to additional charges or more severe punishment, *United States* v. *Seyfried*, 435 F. 2d 696, 697-698 (C.A. 7), certiorari denied, 402 U.S. 912, or tend to show consciousness of guilt, *Beck* v. *United States*, 140 F. 2d 169, 170 (C.A. D.C.). Petitioner's out-of-court statements are not of this character and are not such that a reasonable man would make them only if he believed them to be true.

Rubio's comment to Garcia that he had "gotten even with [petitioner]" by "set[ting] him up on selling something" to a police officer does not admit anything illegal. Indeed, the statements do not even support petitioner's version of the facts, for they merely describe Rubio's role as an informant. As the court of appeals stated (Pet. App. 27):

> There is no showing that Rubio falsified evidence; nor was it shown that Rubio involved Pena in a drug transaction without Pena's knowledge. Rubio could

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[7] The statements could not be admissible, as petitioner suggests (Pet. 11-12), on the ground that they tended to make Rubio "an object of hatred, ridicule or disgrace." The statements did not have that effect, and, moreover, that portion of proposed Rule 804(b)(3) which would have made such statements admissible as declarations against interest was deleted from the final version.

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> well have been discharging his proper role as an informant and at the same time intending to use his status to "get even" with one he believed had killed his brother-in-law. It is not a crime for an informant to assist narcotics agents in "setting up" or trapping a drug dealer if the means employed are lawful, even if his motives are not totally faithful to the government. Rubio's personal motives for helping the government "make this case" against Pena, while vengeful, do not tend to subject Rubio to criminal liability.[8].

Rubio's statements therefore were not admissible as declarations against penal interest.[9]

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[8]Nor does the statement provide any evidence of obstructing or delaying a criminal investigation, which would be criminal under 18 U.S.C. 1510 (see Pet. 11). Likewise, Rubio's statement that he had gotten the money from petitioner, absent any evidence either of the circumstances in which he received the money or of what he subsequently did with it (see Pet. App. 28), is insufficient to show embezzlement under 18 U.S.C. 641 or fraud under 18 U.S.C. 1003.

[9]Even if Rubio's statements were a declaration against penal interest, they were still properly excluded, since under Fed. R. Evid. 804(b)(3) such declarations are inadmissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement," and here there was insufficient corroboration. Petitioner mentions (Pet. 12, n. 3) a portion of Legarreta's testimony, in which he said that Rubio called the Bureau of Narcotics and Dangerous Drugs and told them he had disclosed his role to petitioner (Tr. 45). But Legarreta's testimony, viewed in its entirety, does not corroborate petitioner's version of these events. Indeed, Legarreta's testimony undercuts the entire premise of petitioner's defense because it shows that petitioner knew he was dealing in drugs and that he was the person who could contact the source of the heroin. The only other allegedly corroborating circumstances, *i.e.*, Rubio's disappearance, and a variance in testimony over whether there was a shelf in the men's room (see Pet. 12, n. 3), do not provide the assurances of reliability which are required under this exception to the hearsay rule. See, *e.g.*, *United States* v. *Goodlow*, 500 F. 2d 954, 958 (C.A. 8); *United States* v. *Harris*, 501 F. 2d 1, 7 (C.A. 9).

b. Nor were Rubio's alleged statements admissible under the rationale of *Chambers* v. *Mississippi, supra.* In *Chambers,* the Court held that, under the circumstances of that case, it was error for the trial court to exclude evidence that someone other than the defendant had confessed on four separate occasions, once under oath, to the crime of which the defendant had been convicted. This limited holding does not apply to and should not be extended to the significantly different facts of the instant case.

The excluded testimony in *Chambers* "bore persuasive assurances of trustworthiness" (410 U.S. at 302) which are lacking here. Each confession was made shortly after the crime to which the confessions related, each was corroborated by other evidence, and each "was in a very real sense self-incriminatory and unquestionably against interest" (410 U.S. at 300-301). Here, the excluded hearsay statement was made some five months after the crime for which petitioner was convicted. There was no other evidence from which it could be inferred that Rubio had done anything other than fulfill his role as informant. His statement to Garcia was ambiguous and so minimally, if at all, against his penal interest that it lacks the guarantee of trustworthiness found to exist in *Chambers.*

Moreover, in *Chambers* the declarant was under oath and available for cross-examination (410 U.S. at 301). Here, because of Rubio's unavailability at the time of trial, there was no means of testing the truthfulness of his extrajudicial statements.

Thus, in contrast to *Chambers,* the trial court's ruling here represented no mechanistic application of the hearsay rule (410 U.S. at 302) resulting in deprivation of petitioner's rights, but rather reflected a proper exclusion of unreliable hearsay testimony.

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2. Petitioner also contends (Pet. 17-20) that he was denied his right to a speedy trial. He was indicted on January 26, 1972; his first trial, on June 3, 1974, ended in a mistrial; a second trial, on January 20, 1975, resulted in the convictions.

The court of appeals correctly rejected the speedy-trial claim under the standards of *Barker* v. *Wingo*, 407 U.S. 514, 530, for determining whether a defendant's constitutional right to a speedy trial has been violated.[10] Here, the delay between the original trial and retrial, seven and one-half months, was not inordinate, and was found by the court of appeals not to have been the government's doing (Pet. App. 33).[11] Moreover, petitioner did not assert his right to a speedy trial (or retrial) at any time between his arrest and his second trial.

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[10]One of the grounds on which petitioner asserts (Pet. 19-20) that his right to a speedy retrial was violated is that the period of delay violated a local plan for the prompt disposition of criminal cases. The plan provides that retrial shall commence "not later than ninety days after the order therefor becomes final unless extended." Following a remand for supplemental findings by the district court, the court of appeals found that the acutely congested court docket which prevailed in the district court immediately prior to petitioner's retrial constituted "exceptional circumstances [which] justified an extension of the Plan's time limitations" (Pet. App. 33).

[11]While the period of delay between the date of petitioner's indictment and his second trial was approximately three years, 120 days of the delay was attributable to two continuances granted to petitioner's co-defendant. Petitioner objected to neither continuance and formally consented to the second. The court of appeals found (Pet. App. 34), moreover, that much of this delay, like the delay between the first trial and the retrial, was attributable to the district court's congested docket.

Finally, petitioner has not shown how he was prejudiced by the delay. He suggests (Pet. 9-10, 20) that he was prejudiced by the death, between the dates of his first and second trial, of Ruben Rubio (not related to John Rubio, the D.E.A. informant), who was present at the bar on the night of the heroin transaction. But, as the court of appeals correctly pointed out (Pet. App. 34), this claim rings hollow in light of the fact that Ruben Rubio was not called as a witness at petitioner's first trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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